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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 400

VERA HUKE, Administratrix of the Estate of Robert Huke, deceased,

Petitioner,

vs.

THE ANCILLA DOMINI SISTERS, an Indiana corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

VERA HUKE, Administratrix of the Estate of Robert Huke, deceased, prays that a Writ of Certiorari issue to review the judgment, order and decision of the United States Court of Appeals for the Seventh Circuit entered in this cause on the 26th day of May, 1959.

CITATIONS TO OPINIONS BELOW

The written opinion rendered in the cause by the United States District Court for the Northern District of Indiana, South Bend Division, is not reported officially, but is found in the record printed for the court below and nine (9)

copies thereof filed with this petition. (R. pp. 12-14). The opinion of the United States Court of Appeals is officially reported at 267 F. 2d 96 and is found in said Record Appendix at pages 1-6 of the opinion, attached.

JURISDICTION

The jurisdiction of this court is invoked under Title 28, United States Code Annotated, Section 1254(1).

JUDGMENT

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on May 26, 1959. (R. Appendix (Judgment) p. 1, attached).

A timely petition for rehearing was filed and was denied on June 23, 1959. (R. Appendix (Re-hearing) p. 2, attached) and said judgment then became final.

QUESTIONS PRESENTED FOR REVIEW

1. Under Federal Rules 56 and 12(b) of Civil Procedure, may a trial court, *sua sponte*, convert a motion to dismiss on jurisdictional grounds, into one for summary judgment and render summary judgment without proper notice of hearing, without any hearing thereon and without any evidence submitted, but based only on *ex parte* affidavits offered in aid of motion to dismiss (not converted) and in opposition thereto, in proof of fact issue? Conversely, is not such a procedure violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States and said Rules, providing specific procedure?

2. Must not allegations of complaint be considered to be true until proven to be otherwise by competent evidence at a hearing upon proper notice and proper motion by party litigant and not by the court, *sua sponte*, under Federal Rules 56 and 12(b) of Civil Procedure?

3. Under Fair Labor Standards Act of 1938 and as amended, in order that an employee have the benefit of it and come within it, must the employee be employed in the building in which goods are manufactured or produced for interstate commerce, as was held in this cause?

4. Under Fair Labor Standards Act of 1938 and as amended, in order that a heating engineer, maintenance and service man at the hospital be considered engaged in a necessary occupation or in directly essential occupation to the production of goods for interstate commerce, so as to come within the Act, is it necessary that the heating plant at the hospital (business of employer) be necessarily operated there in order for various industrial concerns to continue their manufacturing operations (business of employer), as was held in this cause?

5. Is not the activity of the employee (petitioner's decedent) and not the business of the employer (respondent operating hospital and heating plant), and its necessity to engagement in the production of goods for interstate commerce, that determines the applicability of the Fair Labor Standards Act of 1938 and as amended?

6. Is not furnishing of hospitalization, medical care and treatment to injured employees engaged in the production of goods for interstate commerce necessary and directly essential to such production under Section 3(j) Sec. 203(j) U.S.C.A. of Fair Labor Standards Act of 1938 and as amended? Conversely, is not an employee engaged in the production of necessary fuel, maintenance and service for the hospital, in order to furnish medical care, hospitalization and treatment for injured employees engaged in the production of goods for interstate commerce, as necessary and as directly essential to such production, as the injured employees themselves are, especially when the laws of the state (Indiana) require such hospitalization,

medical care and treatment to be furnished by the employer, at his expense and to be accepted by the injured employee, which the employer contracted and caused to be furnished with respondent and which the respondent, for consideration, furnished?

7. Is not petitioner's right to recovery and applicability of Fair Labor Standards Act of 1938, and as amended, measured and determined by the Act as it stood in force and effect at the time of rendition of service, rather than by the Act as amended in 1949, regardless of when rendered, as was done in this cause?

8. May an employee for whose benefit and well-being Congress passed this remedial legislation—Fair Labor Standards Act of 1938 and as amended in 1949, be deprived of the benefits thereof by contracting out the necessary and directly essential—medical care, hospitalization and treatment to the injured employees engaged in the production of goods for interstate commerce, for consideration, furnished by the respondent?

9. Is an employee's service as a heating, maintenance and service engineer at the hospital, rendered to injured employees engaged in the production of goods for interstate commerce, a necessary occupation within the meaning and contemplation of Section 3(j) 203 (j) U.S.C.A. of Fair Labor Standards Act of 1938 and as amended, when rendered in the hospital, especially when the laws of the state (Indiana) require that "the employer shall furnish or cause to be furnished, free of charge to the injured employee, an attending physician, for the treatment of his injuries, and in addition thereto, surgical, hospital and nurses services and supplies, which the injured employee is duty-bound to accept" and which the employer caused to be furnished by the respondent and the respondent did furnish them, or must a heating plant at one of the several

hospitals in the area (non-existent) necessarily have been operated there in order for various industrial concerns to continue their manufacturing operations (business of employer), before the Act could apply, as was held in the cause?

THE CONSTITUTIONAL PROVISIONS, STATE STATUTES, FEDERAL STATUTES AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED.

The constitutional provision involved, is the due process clause of the Fourteenth Amendment to the Constitution of the United States. Constitution of U.S.A., Art. 14 Appendix G., *infra.*

The Federal Rules of Civil Procedure involved are Rules 12(b) and 56. They are printed in Appendix A and B, *infra.*

The Federal Statutes involved is the Fair Labor Standards Act of 1938 and as amended. Title 29 U.S.C.A. Sec. 203 (d) and (e) 207 (a) and Sec. 203(j), which is the only section in dispute, and is printed in Appendix D, E, and F, *infra.*

The State Statute involved is Section 40-1225, Burns Indiana Statutes Annotated, 1952 Replacement. Vol. 8, Sec. 40-1225, Burns Indiana Statutes Annotated, 1952 Replacement. It is printed in Appendix C, *infra.*

STATEMENT OF THE CASE

The case was filed on December 22, 1954 (R. p. 1) and revolves around the Fair Labor Standards Act of 1938 and as amended October 21, 1949, the suit being an action for wages, damages and counsel fees, under said Act, for overtime work performed by plaintiff's (petitioner's) decedent from May 20th, 1948 to January 22nd, 1954, continuously, as a building maintenance, heating and service engineer for the respondent corporation, which operated and maintained a hospital known as "St. Catherine Hospital", the only hospital in East Chicago and the adjoining city of Whiting, Lake County, Indiana, where a large number of giant industries are located (Among others: Inland Steel Company; Youngstown Sheet & Tube Company; General American Transportation Corporation; Carbide & Carbon Chemicals Corporation; Standard Oil Company; Shell Oil Company; Sinclair Refining Company; American Steel Foundries; Graver Tank & Manufacturing Company; United Boiler, Heating & Foundry Company; Calumet Iron & Supply Company; Edward Valves, Inc.; U.S. Gypsum Company, and a score of others) and are engaged in interstate commerce and in the production of goods for interstate commerce by their respective employees, great in number, who, when injured in the course of their employment, were and are sent by their respective employers to said hospital of the respondent for medical treatment and hospitalization, for consideration, which the respondent corporation furnished and furnishes at the instance of said employers to their respective employees and which said employers were and are duty bound to furnish and the employees are duty bound to accept under the laws of the State of Indiana.

The amended complaint, as amended, in addition to the usual allegations in such an action contains allegations as to the size of the respondent's hospital (Par. 3); the number of employees engaged in the production of goods for commerce, it serves (Par. 4); the fact that under a contract of employment of the employees engaged in the production of goods for commerce, in the event of injury the employers are duty bound to furnish hospitalization and that the furnishing of said hospitalization was necessary to the production of goods for interstate commerce; that the defendant (respondent) has agreed, for valuable consideration, to furnish and did furnish to the injured employees such hospitalization, and that the furnishing of such hospitalization was necessary to the production of goods for interstate commerce; that the furnishing of such hospitalization was an essential part of such production by such employees (Par. 5, as amended); that furnishing hospitalization to said injured employees is necessary; that in furnishing hospitalization to said injured employees it is necessary that a heating plant be maintained and that plaintiff's (petitioner's) decedent was employed by the defendant (respondent) and maintained said heating plant in said hospital of the defendant (respondent) from May 20th, 1948 to January 22nd, 1954, continuously (Par. 6); that in so owning operating and maintaining said hospital for persons engaged in interstate commerce and in the production of goods for interstate commerce, the defendant (respondent) was engaged in interstate commerce or in the production of goods for interstate commerce within the definition of Fair Labor Standards Act, and that the plaintiff's (petitioner's) decedent by his services as a building maintenance, heating and service engineer, contributed essentially to said commerce and in the production of goods therefor. (Par. 9). R. pp. 2-5. Amended Par. 5, R. p. 11)

To this amended complaint as amended, the defendant-respondent on April 15, 1955 (R. p. 5) addressed a motion to dismiss, upon three grounds: (1) Want of jurisdiction of the subject matter because of want of federal question involved, (2) Want of jurisdiction of the subject matter because of failure to allege a specific and sufficient statement of facts to bring the activities of plaintiff's decedent and/or defendant within the coverage of Fair Labor Standards Act, as amended, (3) The amended complaint fails to state a claim against this defendant upon which relief can be granted. (No reason assigned). (R. pp. 5-6).

Not until February 24, 1958 did the respondent file the affidavit of Sister M. Vetusa in aid of its motion to dismiss amended complaint (R. p. 6), in which, among other things not important to this litigation, she stated that from 1948 to 1954, a period during which petitioner's decedent was employed at the hospital of the respondent there were admitted to St. Catherine Hospital for care and treatment approximately 5,884 industrial accident cases. (R. pp. 6-7).

To this affidavit the petitioner filed her counter-affidavit in which, among other things, she asserted that by reason of furnishing of medical care, treatment and hospitalization, the respondent was engaged in interstate commerce within the meaning and in contemplation of the Fair Labor Standards Act of 1938 and as amended, and that said medical care, treatment and hospitalization were part and parcel and were necessary and indispensable to the production of goods for interstate commerce and in order to engage in interstate commerce. (R. pp. 8-10).

On September 29, 1958, an argument was had on motion to dismiss and the court granted leave to petitioner to amend Paragraph 5 of amended complaint, which was done (R. pp. 10-11). Motion was then taken under advisement. ~~(R. p. 10), and~~ on October 17th, the court entered the following order:

ORDER

The Court in preparing to dispose of this matter as a Motion for Summary Judgment under Rule 12(b); therefore, parties are given 10 days from this date to submit all additional material made pertinent to such a Motion by Rule 56. (R. p. 11)

This attempted conversion of the motion was made by the court and not by respondent, *sua sponte*.

However, no evidence was offered or tendered by respondent in support of the court's converted motion, and, of course, no evidence could be offered in opposition thereto and the trial court thereafter on October 29, 1958 (R. p. 11), again, *sua sponte*, entered a summary judgment for respondent, (R. pp. 11-13).

This the trial court did without any notice of hearing, without a day in court for petitioner, without hearing any evidence but solely by use of said *ex parte* affidavits of Sister M. Vetusa and petitioner's counter affidavit filed as aforesaid, in proof of fact issue (See last paragraph of court's decision, R. p. 13).

From said judgment the petitioner timely prosecuted her appeal to the United States Court of Appeals for the Seventh Circuit, which affirmed the trial court's decision and upon denial of petition for rehearing timely filed, this petition was filed.

The pivotal question on the merits of the cause turns on applicability of Fair Labor Standards Act of 1938 and as amended, to an employee (petitioner's decedent), whose activities at the respondent's hospital as a heating, maintenance, and service engineer, were in relation to injured employees engaged in the production of goods for inter-

state commerce, caused to be furnished as a necessity under local state statutes and which were furnished by the respondent at it's hospital, for consideration. The *Kirschbaum* v. *Walling* (1942), 316 U.S. 517 (524-526); 62 S. Ct. 1116; 86 L. Ed. 1639 (1645, 1647-49) and the *Borden Co.* v. *Borella* (1944), 325 U.S. 679 (682-683); 65 S. Ct. 1223; 89 L. Ed. 1865 (1868-69), doctrines and the doctrines of related cases, in contrast with *10 East 40th Street Bldg., Inc.*, v. *Callus* (1945), 325 U.S. 578, 8 L. Ed. 1806, 65 S. Ct. 1227, are in dispute.

The basis of federal jurisdiction in the court of first instance is Title 28, U.S.C.A., Sec. 41(8), which vests the District Court with original jurisdiction of "all suits and proceedings arising under any law regulating commerce." (Title 28, U.S.C.A. Sec. 41(8).

REASONS FOR GRANTING THE WRIT

1. The procedural aspect here presented is of utmost importance in the federal administration of law and justice by use of summary judgment method in disposition of people's rights under Rule 12(b) of Federal Rules of Civil Procedure by overlooking the constitutional requirements under Rule 56 of Federal Rules of Civil Procedure. Here, the doors of the court were virtually closed to petitioner and by such action petitioner was deprived of property without due process of law, preserved and protected to her by the Fourteenth Amendment to the Constitution of the United States and Rule 56 of Federal Rules of Civil Procedure.

The District Court, the record and its decision disclose, acted *sua sponte*, (R. p. 11) and converted an unconvertible motion to dismiss into one for summary judgment, by use of *ex parte* affidavits in proof of fact issue and rendered a summary judgment without proper notice of hearing, without definite day in court being fixed for hearing,

without any hearing, without opportunity accorded to petitioner to submit evidence in opposition, without opportunity to cross examine witnesses, but with pending good complaint, the allegations of which must be considered to be true, under the laws of the United States.

Yet, the United States Court of Appeals held: "The court meticulously followed out the conditions prescribed by Rule 12(b). We find no error in this respect." In so holding, the United States Court of Appeals for the Seventh Circuit erred grievously.

2. To resolve and determine, whether motion to dismiss is convertible into one for summary judgment under Rules 12(b) and 56 of Federal Rules of Civil Procedure, when the basis for the cause of action under Fair Labor Standards Act of 1938 and as amended, is the activity of the employee and the defendant asserts the want thereof as a ground for want of jurisdiction in the motion to dismiss which is not ground for conversion under said rules, but under a pretense that under Fair Labor Standards Act the basis of the action is the business of the employer, which question is of first impression in this court.

3. To resolve the question of whether under Rules 12(b) and 56 of Federal Rules of Civil Procedure the trial court can act, *sua sponte*, on the matter of conversion of motion to dismiss into one of summary judgment, when the rules specifically grant that privilege and provide that party litigant only, may do so, for obvious reasons, without hearing and trial and render a summary judgment based on *ex parte* affidavits, only, filed in aid of said motion to dismiss, which affidavits are not acceptable subjects of consideration for such a purpose, in proof of would-be fact issue not raised by the motion to dismiss for its cause for conversion, which question is also of first impression in this court.

Settlement of the question by this court is plainly in the public interest, since it is likely to be presented and the decision, unless corrected, followed in almost every action and proceeding in District Courts of the United States, including many thousands of cases now pending before them.

4. The United States Court of Appeals for the Seventh Circuit affirmed the decision of the lower court, because:

> (a) "Plaintiff's (petitioner's) decedent was not employed in any building in which goods were manufactured or produced for interstate commerce. In the instant case it cannot be said that the heating plant at one of the several hospitals in the area must necessarily have been operated in order for various industrial concerns to continue their manufacturing operation." (R. Opinion p. 4).

In so holding said court refused to follow this court's decision in *Borden Co. v. Borella* (1944), 325 U.S. 679 (682-83), 65 S. Ct. 1223; 89 L. Ed. 1865 (1868-69), where this court squarely held:

> "The only distinction between this and the *A. B. Kirschbaum Co.* case lies in the fact that here the employees work in a building where production of goods is administered, managed and controlled rather than carried on physically. We hold, however, that this distinction is without economic or statutory significance and that it cannot form the basis for concluding that the respondent employees are engaged in occupations unnecessary to the production of goods for commerce.
>
> In an economic sense, production includes all activity directed to increasing the number of scarce economic goods."

and the decisions of this court in *Mitchell* v. *Lublin, McGaughy & Associates* (1959), 358 U.S. 207, 3 L. Ed. 2d 243, 79 S. Ct. 260; *Roland Electrical Co.* v. *Walling* (1946), 326 U.S. 657 (662-65), 66 S. Ct. 413, 90 L. Ed. 383 (386-87), and *Kirschbaum* v. *Walling* (1942), 316 U.S. 517 (524-26), 62 S. Ct. 1116, 86 L. Ed. 1639 (1645, 1647-49), and the following Circuit Court of Appeals cases: *Consolidated Timber* v. *Womack* (9th Cir. 1942), 132 F. 2d 101 (106); *Chambers Construction Co.* v. *Mitchell* (8th Cir. 1956), 233 F. 2d 717 (720-21); *Phillips* v. *Star Overall Dry Cleaning Co.* (2nd Cir. 1945), 149 F. 2d 416 (418, 420); and *Fleming* v. *Arsenal Bldg. Corp.* (2nd Cir. 1941), 125 F. 2d 278 (279).

Hence, the decision in the instant case is in direct conflict with the decisions of this court and said United States Courts of Appeals.

(b) "We think the duties of plaintiff's decedent were further removed from the production of goods for commerce than were the maintenance men in the 10 *East 40th Street* case." (R. Opinion p. 5).

No person's duties could be closer to the production of goods for commerce than a person who produces the goods nor the person who serves such person in case of injury, for under such circumstances the person serving an injured employee engaged in the production of goods for commerce is as close to the production as the person producing himself is, as was well put in *Fleming* v. *Arsenal Bldg. Corp.* (2nd Cir. 1941), 125 F. 2d 278, where the court held:

> "Those who man and keep the factory fit for them (there were cutters and stitchers involved) in these ways (furnishing heat), are as necessary to 'production' as they are themselves, because cutters and stitchers cannot work in a cold * * * building."

It is apparent that the United States Court of Appeals for the Seventh Circuit placed an unwarranted comparison of the instant case with the *10 East 40th Street* case where there was a total want of "close and immediate tie" with the process of production, because here the "*nexus*" is ostensibly present, the services of petitioner's decedent having been rendered to the injured employees engaged in the production of goods for interstate commerce and, of course, nothing may be closer or more immediate and directly and essentially tied with the process of production than an injured employee engaged in the production of goods for commerce which was made necessary by the happening of the event—injury, and by the laws of the state (Indiana).

(c) The United States Court of Appeals for the Seventh Circuit measured and determined the non-applicability of the Fair Labor Standards Act of 1948, as amended, to activities that have taken place in 1948 when the amended Act was not in force.

(d) It held "that the complaint and the cause were properly dismissed" (R. Opinion p. 6), when in truth and in fact the court rendered a summary judgment against the petitioner and did not dismiss the complaint nor the cause. (R. pp. 13-14)

5. To resolve whether under *10 East 40th Street Bldg.* v. *Callus* (1945), 325 U.S. 578, 8 L. Ed. 1806, 65 S. Ct. 1227, furnishing of hospital and medical care and treatment to injured employees engaged in the production of goods for interstate commerce, is necessary or unnecessary, especially in view of the fact that the 10 East 40th Street decision specifically states that the Fair Labor Standards Act's applicability is: "with due regard to local regulations", which regulations in the instant case, consisting

of state statutes in the State of Indiana (Sec. 40-1225, Burns Indiana Statutes Annotated, 1952 Replacement) requires that they be necessarily furnished or caused to be furnished by the employer at the employer's expense and that they must be accepted by the injured employee, and which statute has been construed by the Appellate Court of Indiana and the United States Court of Appeals for the Seventh Circuit in another case, to be a matter of necessity.

6. To resolve whether the instant case comes within the doctrine of the *Kirschbaum* decision and the *Borden Co.* decision and even within the exceptions and reservations of *10 East 40 Street* decision, or is the instant case to be controlled by the narrowed-down, particularized and excepted outcome in the *10 East 40th Street* decision?

ARGUMENT.

I.

COMPLETE DENIAL OF DAY IN COURT AND DUE PROCESS.

A cursory examination of the record in the cause will disclose that the petitioner stood before the United States District Court with a strong and good complaint in law which legally remains wholly unchallenged and is well within the purview of this court's expression in *Conley v. Gibson* (1957), 355 U.S. 41 (45-48), 2 L.Ed. 2d 80 (85-86), 78 S.Ct. 99, where the court says:

> "In appraising the sufficiency of the complaint, we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

That, in construing the Federal Rules of Civil Procedure:

> "They do not require claimant to set out in detail facts upon which the pleader bases his claim. To the contrary, all the rules require is 'a short and plain statement of the claim', that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."

That:

> "All pleadings shall be so construed as to do substantial justice."

That:

> "The Federal Rules reject the approach that pleading is a game of skill in which one mis-step by counsel may be decisive to the outcome and accept the prin-

ciple that the purpose of pleading is to facilitate a proper decision on the merits."

In *Mitchell, Secretary of Labor* v. *Pilgrim Holiness Church Corp.* (7th Cir. 1954), 210 F. 2d 879 (881-82), the court has held that allegations of complaint must be considered to be true but, Respondent filed motion to dismiss addressed to the amended complaint on three grounds: 1 and 2 on the grounds of jurisdiction and 3 on the ground that it fails to state a claim against the respondent upon which relief can be granted, but assigned no reason therefor.

We like to think that the practice of law is a profession of logic and reason. Since grounds 1 and 2 are without any merit whatsoever and since ground 3 is reasonless and since, under the Fair Labor Standards Act of 1938 and as amended, the activity of employee and the necessity of it is the determining factor as to applicability of the Act, it follows as a necessary conclusion that said motion is not subject of conversion into a motion for summary judgment under Rules 12(b) and 56 of Federal Rules of Civil Procedure, as much as zero plus zero must equal zero. If that is not true, then Sir John Powell was wrong when he said, "Let us consider the reason of the case, for nothing is law that is not reason".

Without alleging a reason for the ground, respondent presented no issue of fact for investigation. We certainly were not to engage in a fishing expedition?

Yet, the trial court in its wisdom, without any move on the part of respondent, proceeded, *sua sponte*, to convert said motion into one for a summary judgment and it did so in the following fashion: By entering an order upon filing of an amended paragraph to amended complaint, reading as follows:

> "The court is preparing to dispose of this matter as a Motion for Summary Judgment under Rule 12(b); therefore, parties are given 10 days from this date to submit all additional material made pertinent to such a Motion by Rule 56."

Surely, this is an unprecedented move and order of the trial court, *sua sponte*; for usually, the court hears the case before it prepares to dispose of it.

The inception of that move was the filing of an *ex parte* affidavit of Sister M. Vetusa in aid of respondent's motion to dismiss. (R., p. 6) But, upon contest on that score, it developed that consideration of such a motion is improper as was held by this court in *Stewart* v. *Masterson* (1888), 131 U.S. 151 (158), 33 L. Ed. 114 (116), namely:

> "That in case of motion to dismiss, the court cannot look beyond the allegations of the complaint and that a motion to dismiss cannot introduce as its support any facts which do not appear on the face of the complaint."

The court will note that the above order fixed no time for petitioner to present any evidence in opposition. Apparently, the trial court was of the opinion that the petitioner was not entitled to be heard or to a day in court or to give evidence in opposition or to cross-examine respondent's witnesses, despite the fact that Rules 12(b) and 56 expressly provide that a hearing must be had on such a motion, upon notice. There was no notice given of any hearing and there was no hearing had, and consequently, there was no evidence of any kind offered or introduced in support of "an unknown fact issue" and the trial court, *sua sponte*, without complying with the provisions of said rules for hearing, entered a summary judgment for respondent and thus disposed of the matter. This disposi-

tion the United States Court of Appeals for the Seventh Circuit calls "meticulous". It, too, overlooked the requirements of notice and hearing on the motion and the further fact that under said rules the Judge cannot be the movant and trier, but must be passive and impartial.

We believe it to be well settled that the movant has the burden and responsibility of establishing and proving non-existence of genuine issue, under motion for summary judgment, so the court held in *Sarkes Tarzian* v. *United States* (7th Cir. 1957), 240 F. 2d 467 (470-71).

In 6 Moore's Federal Practice, 2070-1, 2339, *et seq.*, the author says:

> "And the burden is upon the moving party to establish the lack of a triable issue of fact; all doubts are resolved against him, and his supporting affidavits and depositions, if any, are carefully scrutinized."
>
> Among the factors to be considered by a court dealing with summary judgment, these are enumerated: The need for cross-examination by the opposing party in relation to any evidentiary material, the general desirability of demeanor testimony, access to proof by the opposing party and general desirability that the case receive the full exploration of a trial."

but respondent did not even attempt to undertake that burden; it offered not a scintilla of evidence in support of the converted motion. Thus, petitioner's complaint stood and stands, in the eyes of the law, unimpeached and undenied.

An examination of said affidavit of Sister Vetusa will disclose that it in no way disputes or denies the allegations of the complaint, but only alleges that the respondent "never produced any goods for interstate commerce or otherwise". (R. p. 7) The petitioner in her complaint never contended that the respondent produced goods for

interstate commerce. It also admits the allegations of the complaint and not only that, it supports petitioner's cause of action for the affidavit alleges that from the year 1948 to 1954, inclusive, there were admitted to St. Catherine Hospital for care and treatment approximately 5,884 cases which were classified as industrial accident cases. (R. p. 7)

Thus, again we have a situation where motion for summary judgment for defendant has no ground to stand on.

Petitioner filed her counter-affidavit in which petitioner, among other things, affirmed: "That said services of plaintiff's decedent and necessaries furnished by the defendant (respondent) alleged therein, were part and parcel and were necessary and indispensable to the production of goods for interstate commerce and in order to engage in interstate commerce". (R. pp. 8-10)

Thus by this state of the record two legal questions presented themselves to the court:

1. The petitioner asserted a right to recover upon one theory of her complaint the necessary services rendered to the injured employees engaged in the production of goods for commerce by respondent's employee, while the respondent and or the court for the resondent, denied liability, because it did not produce goods for commerce."

In *Sarkes Tarzian* v. *United States* (7th Cir. 1957), 240 F. 2d 467 (470-71) the court held:

> "If the determination of this motion for a summary judgment required the trial court to choose between conflicting possible inferences from the evidence the motion should not have been granted. *Rowan* v. *United States*, 5 Cir., 219 F. 2d 51; *United States* v. *General Ry. Signal Co.*, D.C.W.D.N.Y., 110 F. Supp. 422."

In *Slagle, etc. v. United States* (5th Cir. 1956), 228 F. 2d 673 ,676-78), the United States Circuit Court of Appeals for the Fifth Circuit has held that a party has a right to prove a claim upon a theory stated in the complaint, and since the theory of the complaint cannot be any other than that expressed in petitioner's complaint, the court had no other theory that it could adopt in that defense.

In *Garrett Biblical Institute v. American University* (D.C. Cir. 1947), 163 F. 2d 265 (266), the court held:

> "Paintiff should be able to show that if plaintiff's legal theory is adopted a genuine dispute as to material fact exists."

and just off the press, in *Brancier v. Pearl Assurance Company, Ltd.* (9th Cir. 1958), the court held:

> "A summary judgment cannot be granted if there be a disputed question of material fact."

The trial court rendered a summary judgment, as aforesaid, by use of *ex parte* affidavits aforesaid in the solution of disputed issues of fact. The opinion of the trial court boasts of it. (R. p. 13)

Under no circumstances can a disputed issue of fact be resolved by affidavits, nor may affidavits be treated for purposes of the motion for summary judgment as proof contrary to well pleaded facts in the complaint, holds the Fifth Circuit Court of Appeals in *Slagle, etc. v. United States* (1956), 228 F. 2d 673 (676-78).

Perhaps the leading case on that score is *Frederick Hart & Co., Inc. v. Recordgraph Corp.* (3rd. Cir. 1948), 169 F. 2d 580 (581) where the court states:

> "It is well settled that on motions to dismiss and for summary judgment, affidavits filed in their support may be considered for the purpose of ascertaining whether an issue of fact is presented but they cannot

be used as a basis for deciding the fact issue. An affidavit cannot be treated, for the purposes of the motion to dismiss, as proof contradictory to well-pleaded facts in the complaint. *Fairall* v. *District of Columbia Amateur Athletic Union*, 1946, 80 U.S. App. D.C. 396, 153 F. 2d 647; *United States* v. *Association of American Railroads*, D.C. Neb. 1945, 4 F.R.D. 510; 2 Moore's Federal Practice (2nd ed. 1948), pages 2254, 2255."

It would appear to petitioner and her counsel that the trial court as well as the United States Court of Appeals for the Seventh Circuit has traveled the wrong road and deprived the petitioner of valuable right, a right to compensation for work and labor performed without due process of law.

We believe that the *sua sponte* doctrine, has been well observed and defined by the Supreme Court of South Carolina in *State* v. *Parker* (1875), 7 S.C. 235 (240), cited in 42 CJ, Para. 12, page 468, where the court says:

> "Judge shall remain passive until moved in the right of those interested in invoking the action of the court. Remedies of all cases, while granted by the court in recognition of the right of the parties demanding them, are selected or sought for by the parties themselves as means of promoting their personal interest. So a Judge cannot properly initiate a remedy in behalf of any party, because he cannot properly represent the interests of the party for whose benefit such remedy is intended. It is a mistaken idea that the court has any personal or official interest in the mode in which its process is employed or in the results attained through it. It is the party alone who is interested in the process issued in his behalf and he is at liberty to take or decline all that the law intends for him by issuing in his behalf the process of the court."

We urge the application of the rule to the instant case in the solution of the propriety of the action in the instant case by the trial court under Rules 56 and 12(b) of Federal Rules of Civil Procedure.

II.

DETERMINATION OF APPLICABILITY OF FAIR LABOR STANDARDS ACT.

For the first time since the passage of Fair Labor Standards Act in 1938 is presented to the court for solution the question of "necessity of activity of an employee engaged as a heating, maintenance and service engineer at a 'hospital' for and in behalf of injured employees engaged in many giant industries in the State of Indiana in the production of goods for interstate commerce, which industries caused them to be furnished at their expense, by the respondent, operating a hospital".

Thus, we present a case involving hundreds of giant local industries employing thousands of employees engaged in the production of goods for interestate commerce and many employees employed in privately owned and operated industrial hospital, a hospital that serves such industries, *in gremio*.

The question is, whether such an activity is necessary and directly essential to such production within the meaning and in contemplation of Section 3(j), Sec. 203(j) U.S.C.A. of said Act of 1938 and as amended?

The trial court answered that question in the negative, because "the respondent was an eleemosynary corporation and was not engaged in interstate commerce or in the production of goods for interstate commerce within the meaning and contemplation of the Fair Labor Standards Act." (R. p. 13).

Upon appeal to the United States Court of Appeals for the Seventh Circuit, that court affirmed it, because:

(1) "Here, plaintiff's decedent was not employed in any building in which goods were manufactured or produced for interstate commerce."

(2) Because: "In the instant case it cannot be said that the heating plant at one of the several hospitals (non-existent) in the area must necessarily have been operated in order for various industrial concerns to continue their manufacturing operation."

(3) Because: "We think the duties of plaintiff's decedent were further removed from the production of goods for commerce than were the maintenance men in the *10 East 40th Street* case."

(4) Because: By the amendment of Section 3(j) of Fair Labor Standards Act, Congress intended the amendment to restrict coverage from that indicated by some of the earlier court decisions.

In *Kirschbaum* v. *Walling* (1942), 316 U.S. 517 (524-26), 86 L. Ed. 1639 (1645, 1647-49), 62 S. Ct. 1116, and in *Fleming* v. *Arsenal Bldg. Corp.* (2nd Cir. 1941), 125 F. 2d 278 (279), which it was reviewing, the activities of maintenance men were in relation to tenant's business—interstate commerce, and in the instant case the activities of petitioner's decedent were in relation to many employers' business—also commerce and also contracted out and delegated to respondent to be carried out, for consideration and which it did by its employee, petitioner's decedent.

Thus, the instant case is closely connected to interstate commerce, for here there is present the continuity of service to those directly engaged in the production of goods for interstate commerce—the injured employees themselves. In all other respects the instant case and the

Kirschbaum case and *Arsenal* case are very similar, where the building was provided with necessary services—heating, maintenance, hot water, etc., in most instances, in our humble opinion, necessary to carry on commerce. There is a complete unity of necessity and purpose, and therefore, the broad principles announced in the *Kirschbaum* and *Arsenal* cases are applicable to the instant case and, consequently, the decision in the instant case conflicts with said decisions.

We wish to reiterate that which is squarely applicable to the cause and which is stated in *Fleming* v. *Arsenal Bldg. Corp.* (2nd Cir. 1941), 125 F. 2d 278 (279), that:

> "Those (maintenance men and elevators operators) who make and keep the factory fit for them (merchants) in these ways are as necessary to production as they are themselves."

We say, in paraphrasing that statement of the weighty court that:

> "A heating and maintenance man (petitioner's decedent) who made and kept the hospital fit for respondent and injured employees in furnishing heat and in maintaining the hospital, was as necessary to production of goods for commerce as the injured employees themselves were."

It is not where the commerce is carried on, nor what the business of employer is that determines applicability of Fair Labor Standards Act of 1938 or as amended, but, what the activity of the employee (in this case petitioner's decedent) was in relation to the production of goods for commerce and its necessity that determines the applicability of said Act to such an employee. So it has been held in the *Kirschbaum* case, in the *Arsenal* case, in the *Borden* case and in many other cases.

Thus, again in *Chambers Construction Co. v. Mitchell* (8th Cir. 1956), 233 F. 2d 717 (720-21), the court held:

> "* * * and the employee need not be physically engaged in the construction work on the facility in order to be within the coverage of the Act. It is necessary only that he be in a related process or occupation directly essential thereto.' 29 U.S.C.A. sec. 203(j)."

A parallel case is *Consolidated Timber Co. v. Womack* (9th Cir. 1942), 132 F. 2d 101 (106). In that case the company was engaged in the business of logging and lumbering. It operated a "cookhouse" which consisted of a kitchen and dining room in a "separate" building of the company. Cookhouse facilities were available to company's employees, to employees of other companies and to the "general public." Consolidated's employees, were not compelled to take their meals at the cookhouse; many of them ate at home; greater portion of them took their meals elsewhere than at the cookhouse; those that ate at the cookhouse who comprised the general public and the employees of other contractors paid in cash for their meals, while Consolidated's employees paid by deductions out of wages and paid 10% less per meal than those who paid in cash. The cookhouse was operated as a "self-sustaining" venture, without profit, that is, at cost. Womack was engaged as a "baker" in the cookhouse. He brought suit for overtime work performed under Fair Labor Standards Act. The question was as to whether Womack, so engaged, was engaged in the production of goods for commerce under Section 3(j) of Fair Labor Standards Act by reason of the fact that he prepared and served meals to loggers.

The court's answer to that was in the affirmative, and the court held:

> "that the cookhouse was maintained not for the purpose of profit, but to render a very necessary assist

> ance to the business of the company; that it mattered not that the greater portion of company's business was intrastate commerce; that it is of no consequence to argue that the company might have made arrangements for meals elsewhere or otherwise, because 'it is not what could have been the fact, but actually was the fact', upon which the decision must rest."

In *Chambers Construction Co.* v. *Mitchell* (8th Cir. 1956), 233 F. 2d 717 (720-21), in which applicability of Fair Labor Standards Act was involved in a construction work upon municipal water and sewer systems of Nebraska, it was claimed that the business was local. In that case four workmen whose work was "necessary" to the performance of construction contract who has not been paid their overtime wages were involved, and the court at page 720, says:

> "Appellants assert, correctly, that the nature of the employer's business is not determinative, the application of the Act depending upon the character of employees' activities and not the nature of the employer's business."

The court further holds that "where coverage is bottomed on 'production of goods for commerce', and it is necessary, then the rule that the work be so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be in practical effect a part of it, rather than isolated local activity; is inapplicable. That actual physical contact with goods produced for interstate commerce is not essential to bring a laborer within coverage of the Act as one engaged in the production of goods for commerce."

In *Roland Electrical Co.* v. *Walling* (1946), 326 U.S. 657 (662-65), 66 S. Ct. 413, 90 L. Ed. 383 (386-87), in which the question was involved as to when the Act is applicable,

the court answered that "it is enough that employee's occupation be 'necessary to the production'. There may be alternative occupations that could be substituted for it, but it is enough that the one at issue is needed in such production and would, if omitted, handicap the production." Is not production handicapped by injury? And by failure to furnish hospitalization and medical treatment?

In *Mitchell, Secretary of Labor* v. *Anderson* (9th Cir. 1956), 235 F. 2d 638 (640-41), was involved the necessity of "food" in order to engage in the production of goods for interstate commerce. In this case it was held that where "bunk house" and "mess hall" operated by independent contractor, which were needed by mining company, in that the production at mine would have been affected, by absence of bunk house and mess hall, the court held that employees at bunk house and mess hall were pursuing an occupation which was directly essential to production of ore for commerce and that the employees came under the Fair Labor Standards Act. And the court reasons as follows:

> "It is of course essential that employees have adequate food and lodging and if these are not available otherwise, there can be no product unless the employer acts to furnish them. When he does so, employees working in such facility are doing work as 'necessary' or as 'essential' as those who work in the 'factory' proper. Such is the broad principle of our *Consolidated Timber Co.* v. *Womack* case, 1942, Cir., 132 F. 2d 101, 106."

Is it not necessary that the employees have hospitalization and medical treatment, when they are injured?

We now come to consideration of the *10 East 40th Street Bldg., Inc. v. Callus*, (1945), 325 U.S. 578, 8 L.Ed. 1806, 65 S.Ct. 1227.

Distinguishing characteristics of the *10 East 40th Street* case from the instant case:

1. There the court was dealing with a typical 48 story office building (a giant to the hospital in question), which the court found to be:

> "Indisputably devoted to offices, only, where no manufacturing was carried on within it, but was run for the purpose of housing all the usual miscellany of offices which the court especially found had many differences in the practical affairs of life from a manufacturing building or office building of a manufacturer and where only some portion of the offices 'may, for the time being be offices of manufacturing enterprises', which the court also found to be distinctive and independent enterprise as an office building, only, and, therefore, too many steps removed from the physical process of the production of goods."

but where, however, the court expressly and specifically made the following reservations:

> "'Mere separation of an occupation from the physical processes of production, does not preclude application of Fair Labor Standards Act."

and where the court specifically differentiated the cases in which

> " 'the nature of the nexus between employees who, though not themselves engaged in commerce are engaged in "occupation necessary" for the production of goods for commerce' by describing the necessary work that brings the occupation within the scope of the Act as work that had 'a close and immediate tie with the processes of production' ", citing *Kirschbaum* case.

And with this final reservation: "with due regard to local regulations".

In the instant case we are dealing not with a typical office building where no commerce or production was carried on, where but temporary tenant would engage in manufacturing enterprise, but with a hospital, the only hospital located in the vicinity of East Chicago and Indiana Harbor in East Chicago, and the City of Whiting, Lake County, Indiana, where numerous giant industries are located and where this hospital plays the roll of an industrial hospital where, admittedly, constantly it serves said local industries and their injured employees engaged in the production of goods for commerce by said employees, great in number, it having served from 1948 to 1954 approximately 5,884 industrially injured employees engaged in the production of goods for commerce, who, when injured in such production, for consideration, were and are hospitalized by respondent at the instance of many employers for treatment and medication, which the employers were duty-bound by the laws of the State of Indiana to furnish or cause to be furnished by Section 40-1225, Burns Indiana Statutes Annotated, 1952 Replacement, and which the injured employees were duty-bound to accept.

Thus, the instant case satisfies each and every requirement imposed by the *10 East 40th Street* case:

1. Close and immediate tie with processes of production.
2. Necessity.
   (a) By reason of injury.
   (b) By local regulations—state statutes.
   Section 40-1225, Burns Indiana Statutes Annotated, 1952 Replacement. (App. p. 34)

and which the Indiana Appellate Court construed and held that the furnishing of hospitalization and medical care

and treatment is "necessary", in *Farmers Mutual v. Chaney* (1944), 114 Ind. App. 372 (380), 51 N.E. 2d 378 (381), and in *Standard Brands, Inc. v. Moore* (1944), 114 Ind. App. 500 (506), 51 N.E. 2d 865 (867), where it said:

> "We must hold, therefore, that the *necessity* for medical, surgical, hospital and nurse services arises when first sought and obtained by the injured person after his accident and that the ninety day period during which the employer is liable for such services begins to run from that date."

This court in *Borden Co. v. Borella* (1944), 325 U.S. 679 (682-683), 65 S.Ct. 1223, 89 L.Ed. 1865 (1868-69), deals "with labor" and its necessity to the production of goods for commerce, and it says:

> "Labor is but an integral part of the coordinated productive pattern of modern industrial organization * * *. Economic production in other words, requires planning and control as well as 'manual labor'. He who conceives or directs a productive activity is as 'essential' to that activity as the one who physically performs it. From a productive standpoint, therefore, since the respondent maintenance employees stand in the same relation to this production, as did the maintenance workers in *A. B. Kirschbaum Co.* case, it follows that they are engaged in occupation 'necessary' to such production, thereby qualifying for the benefits of Fair Labor Standards Act * * *. Where, as here, the work of employees is 'essential' or 'necessary' to such activities of a productive nature, the employees fall within the purview of Section 7(a), even though those directly engaged in such activities are by express exemption precluded from sharing in its benefits. * * * Since they bear the same relation to production as did the maintenance employees in *Kirschbaum* case, they cannot be considered any less essential to production. * * * petitioner's industrial

organization is such that the operation and maintenance of a simple office building is essential to the economy, efficiency and *'continuity of production.'* In short, this office is 'part of an integrated effort for production of goods'."

Is not furnishing hospitalization and medical care to injured employees engaged in the production of goods for commerce necessary to continuity of production?

And, lastly, the court below observed:

"By the amendment of Section 3(j) of Fair Labor Standards Act, Congress intended the amendment to restrict coverage from that indicated by some of the earlier court decisions."

This contention this court answers in *Mitchell* v *Lublin, McGaughy & Associates* (1958) 3 L.Ed. 2d 243, where the court says:

"However, within the tests of coverage fashioned by Congress, the Act has been construed liberally to apply to the furthest reaches consistent with congressional direction."

and

"In our modern, technologically oriented society, the elements which combine to produce a final product are diffuse and variegated."

"Respondent contends that its activities are essentially local in nature. But as we stated, Congress deemed the activities of the individual employees, not the employer, the controlling factor in determining the proper application of the Act, and where this court held 'draftsmen, fieldmen, clerks and stenographers' to be within the compass of Fair Labor Standards Act."

And, the court erroneously applied 1949 amendment of Sec. 3(j) of Fair Labor Standards Act to 1948 contract of employment, a non-existent law. We believe the law to be that the existing applicable statutes are part and parcel

of every valid contract of employment, when in effect, and no other.

May we also, in conclusion, call the court's attention to the fact, that despite the truth and the fact that the trial court rendered a summary judgment versus petitioner (R. p. 13-14), the United States Court of Appeals for the Seventh Circuit erroneously held "that the complaint and cause were properly 'dismissed'." (R. p. 6-Opinion)

There is a basic difference between dismissal of the cause and a dismissal of the complaint and the rendering of a summary judgment.

CONCLUSION.

For these reasons petitioner prays that this petition be granted in order to resolve the apparent new questions of law under Rules 42(b) and 56 of Federal Rules of Civil Procedure; in order to resolve an apparent conflict of the decision in the instant case with the decisions of this court in the *Kirschbaum* and *Borden* cases and other United States Court of Appeals cases; in order to resolve the unwarranted interpretation placed by this decision on the *10 East 40th Street* case and the *Borden* decision, both decided on the same day, which in the opinion of Justice Stone conflict with each other; and lastly, in order to determine the applicability of the *Kirschbaum* doctrine and the *Borden* doctrine to such situation, as is here presented, the case before the court presenting a situation of first impression in this court or in any other court in federal or state jurisdiction.

Respectfully submitted,

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Appendices follow

APPENDICES

APPENDIX A

Rule 12(b) of the Federal Rules of Civil Procedure reads, in part, as follows:

> "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

APPENDIX B

Rule 56 of the Federal Rules of Civil Procedure reads, in part, as follows:

> "Summary Judgment:
>
> (b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
>
> (c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
>
> (d) *Case Not Fully Adjudicated on Motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial

controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly."

APPENDIX C

Section 40-1225, Burns Indiana Statutes Annotated, 1952 Replacement, reads as follows:

"Medical, surgical, hospital and nurse services—Spiritual healers—Payment for—Effect of employee's refusal to accept—Employer to furnish artificial limbs.

* * * during the first 180 days after an injury occurring on and after April 1, 1947, the employer shall furnish or cause to be furnished, free of charge to the injured employee, an attending physician, for the treatment of his injuries, and in addition thereto such surgical, hospital and nurse's services and supplies as the attending physician or the industrial board may deem necessary.

* * * The refusal of the employee to accept such services and supplies, when so provided by or on behalf of the employer, shall bar the employee from all compensation otherwise payable during the period of such refusal and his right to prosecute any proceeding under this Act shall be suspended and abated until such refusal ceases; * * *"

APPENDIX D

Sections 3(d) and 3(e) of the Fair Labor Standards Act of 1938, read as follows:

"'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee * * *."

"'Employee' includes any individual employed by an employer."

APPENDIX E

Section 3(j) of the Fair Labor Standards Act of 1938, reads as follows:

> "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any state; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any state."

and which was amended in 1949, in conclusion, as follows:

> "* * * or in any closely related process or occupation directly essential to the production thereof, in any state."

APPENDIX F

Section 7(a) of the Fair Labor Standards Act of 1938 and as amended, reads as follows:

> "Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

APPENDIX G

The Fourteenth Amendment to the Constitution of the United States reads, in part, as follows:

> "Sec. 1. * * * nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 400

VERA HUKE, Administratrix of the Estate of Robert Huke, deceased,

Petitioner,

vs.

THE ANCILLA DOMINI SISTERS, an Indiana corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

APPENDICES.

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In the

United States Court of Appeals

For the Seventh Circuit

No. 12560

VERA HUKE, Administratrix of the Estate of ROBERT HUKE, Deceased,
Plaintiff-Appellant,
vs.
THE ANCILLA DOMINI SISTERS, an Indiana Corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division

Chicago 10, Illinois

Before

Hon. F. Ryan Duffy, Chief Judge

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. John S. Hastings, Circuit Judge

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, South Bend Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs, in accordance with the Opinion of this Court filed this day.

In the

United States Court of Appeals

For the Seventh Circuit

No. 12560

VERA HUKE, Administratrix of the Estate of ROBERT HUKE, Deceased,
Plaintiff-Appellant,
vs.
THE ANCILLA DOMINI SISTERS, an Indiana Corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division

---

Opinion and Judgments below.

Before DUFFY, *Chief Judge*, and SCHNACKENBERG and HASTINGS, *Circuit Judges*.

DUFFY, *Chief Judge*. The Ancilla Domini Sisters is an Indiana corporation which for some time past has operated St. Catherine Hospital in East Chicago, Indiana. This hospital serves the general public. Plaintiff's husband, now deceased, was employed at the hospital from May 20, 1948 to January 22, 1954 as a fireman or maintenance man who worked in the hospital heating plant. The complaint alleges that plaintiff's decedent worked overtime and was entitled to recover wages and attorney fees for such alleged overtime work under the Fair Labor Standards Act of 1938 as amended October 26, 1949. 29 U.S.C.A. 201 *et seq.*

Under § 7(a) of the Act, overtime compensation must be paid to all employees "engaged in commerce or in the production of goods for commerce." Plaintiff contends her late husband was under the Act because several large industries located in or near East Chicago, Indiana, customarily sent any employee who was injured at their plants to St. Catherine Hospital to obtain hospital treatment. Plaintiff argues that her husband was thus engaged in commerce or in the production of goods for commerce; that his work had such a close ~~and immediate~~ tie with the production of goods for commerce that he was covered by the Act.

Defendant interposed a motion to dismiss the complaint on three grounds: 1) lack of jurisdiction because of want of a federal question; 2) lack of jurisdiction because the activities of plaintiff's decedent had no relation to the production of goods in interstate commerce, and 3) failure to state a claim upon which relief could be granted.

At a pretrial hearing, plaintiff was given leave to file an amendment to the amended complaint, and thereafter did so. At this hearing, defendant filed an affidavit in support of its motion to dismiss, and plaintiff filed a counter-affidavit. These affidavits were accepted by the Court. Thereafter, the District Court notified the parties that the Court was preparing to dispose of the matter as a motion for summary judgment under Rules 12(b) and 56, F.R.Civ.P. The parties were given ten days within which to submit all additional material pertinent to such motion. Neither party submitted anything further. Treating the motion as one for summary judgment, the Court entered judgment for the defendant.

The District Court said, "Defendant was not engaged in interstate commerce or in the production of goods for

commerce within the meaning and contemplation of the Fair Labor Standards Act. Defendant is an eleemosynary institution dedicated to the healing of men's bodies in one local area of the State of Indiana. Most certainly, the Fair Labor Standard Act is a remedial statute and should be given a liberal interpretation. However, the most strained interpretation that one could possibly impose upon the statute could not bring plaintiff within the meaning of the Act. Congress has deemed it best that local business be left to the protection of the sovereign states of our nation."

Plaintiff claims the action by the District Court in granting a summary judgment was capricious and arbitrary. We disagree. Rule 12(b) of F.R.C.P. provides, in pertinent part: "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

The motion before the Court did ask for a dismissal for failure of the amended complaint to state a claim upon which relief can be granted, and the Court meticulously followed out the conditions prescribed by Rule 12(b). We find no error in this respect.

We do not think there is any dispute as to the controlling and material facts in this case. In the seven years from 1948 to 1954 there were admitted to St. Catherine Hospital for care and treatment a total of 82,195 patients. Of that number 5,884 were classified as industrial accident cases. There is no dispute that practically all of the industrial accident cases were employees

of industrial concerns located at or near East Chicago, Indiana, and that such concerns sold their products in interstate commerce.

On the merits plaintiff relies principally upon *Kirschbaum Co. v. Walling*, 316 U.S. 517.[1] In *Kirschbaum*, the petitioner owned and operated a six-story loft building in Philadelphia. The tenants were mostly manufacturers of men's and boys' clothing engaged in interstate commerce. Petitioner employed in said building an engineer, three firemen and other maintenance men. In *Arsenal*, petitioner owned and operated a 22-story building in the heart of the New York City clothing manufacturing district. Practically all of the tenants bought and sold ladies' garments in interstate commerce. Two firemen and other maintenance employees were involved.

In *Kirschbaum* the court pointed out that the scope of the Fair Labor Standards Act was not co-extensive with the limits of the power of Congress over commerce, and in enacting this law that Congress chose not to enter areas which it might have occupied. In that case, however, the court held the maintenance employees in question were covered by the Act. The court said, page 524: "• • • Without light and heat and power the tenants could not engage, as they do, in the production of goods for interstate commerce. The maintenance of a safe, habitable building is indispensable to that activity. • • •".

It is readily apparent that in the instant case, plaintiff urges a considerable extension of the rule announced in *Kirschbaum*. Here, plaintiff's decedent was not employed

[1] Considered with **Kirschbaum** was **Arsenal Building Corp. et al. v. Walling**, 316 U.S. 517.

in any building in which goods were manufactured or produced for interstate commerce. In the instant case it cannot be said that the heating plant at one of the several hospitals in the area must necessarily have been operated in order for various industrial concerns to continue their manufacturing operation.

Two cases involving maintenance employees were decided by the Supreme Court in 1945 on the same day. They are *Borden Co.* v. *Borella*, 325 U.S. 679, and *10 E. 40th Street Building, Inc.* v. *Callus*, 325 U.S. 578. Plaintiff relies upon the *Borden* case; defendant relies upon the *10 East 40th Street* case.

In *Borden*, a large manufacturing concern owned and operated a 2-story office building in New York City. Borden, the owner, occupied 17 of the 24 floors and 58% of the rentable area. Borden had manufacturing plants throughout the United States and Canada. The Court said: "* * * The heart of this industrial empire, however, lies in the central office building in New York City. Here the entire enterprise is supervised, managed and controlled." The court held that porters, elevator operators and night watchmen were under the Act.

In *10 E. 40th Street*, the court considered the status of maintenance employees of a typical metropolitan office building operating as an independent enterprise. This building was occupied by a variety of tenants including some who were producers of goods for commerce. The opinion was written by Mr. Justice Frankfurter, who also wrote the opinion in *Kirschbaum* v. *Walling*, *supra*. The decisions in *Borden Co.* v. *Borella* and in *Kirschbaum Company* v. *Walling* were distinguished. The court held the maintenance employees did not have such a close and immediate tie with the process of production as to be

deemed engaged in an occupation necessary to the production of goods for commerce within the meaning of §3(j) of the Fair Labor Standards Act and therefore were not covered by the Act. We think the duties of plaintiff's decedent were further removed from the production of goods for commerce than were the maintenance men in the *10 East 40th Street* case.

The only reported case involving the employees of a hospital which has been called to our attention is *Juarez v. Kennecott Copper Corporation*, (1955), 10 Cir., 225 F.2d 100, Kennecott was engaged in the mining and processing of copper ore from an open pit copper mine in Santa Rita, New Mexico. It also operated a smelter and refinery at Hurley, New Mexico, which combined operation was known as its Chino Mines Division. In connection with the operation at Santa Rita, Kennecott had for many years maintained a company-owned and operated hospital located at the rim of its open pit at Santa Rita. The plaintiffs in that case were employed in various capacities in connection with the operation of the hospital. The court observed that only 20% of the patients were employees, while 80% were members of employees' families or of the general public. The court held the employees of the hospital were not covered by the Act.

In *Kennecott*, the court referred to cases which were relied on by plaintiffs in that case and which were decided before the amendment of §3(j) of the Act in 1949. The Court pointed out that by the amendment the word "necessary" was eliminated in favor of "directly essential" and the words "closely related" were added making the section read: " • • • in any closely related process or occupation directly essential to the production thereof • • •" We agree with the court's conclusion that Congress intended the amendment to restrict coverage from that indicated by some of the earlier court decisions.

We hold that plaintiff's decedent was not covered by the Fair Labor Standards Act, and the complaint and the cause were properly dismissed.

AFFIRMED

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

In the

United States Court of Appeals

For the Seventh Circuit

No. 12560

VERA HUKE, Administratrix, etc., *Plaintiff-Appellant*, vs. THE ANCILLA DOMINI SISTERS, etc., *Defendant-Appellee*.	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division

Chicago 10, Illinois
Monday, June 23, 1959
Before

Hon. F. Ryan Duffy, Chief Judge

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. John S. Hastings, Circuit Judge

It is ordered by the Court that the Petition for a Rehearing of this cause be, and the same is hereby, DENIED.